

Questions and Answers on the CA Study Appeal Process

Q: Now that the CA Study decision is about to be announced, tell me about the appeal period.

A: A public viewing of cost study documents and appeal period will begin January 8th, 2003 and continue through February 4th, 2003. There are various appeal avenues and periods beginning with a US Army Medical Command (MEDCOM) Administrative Appeals Board (AAB). Following February 4th, another 30 days is allowed for evaluation of appeals by the AAB. In addition, contractors can protest through the General Accounting Office. We anticipate all appeal and protest decision periods to be exhausted by the June/July 2003 timeframe, which would allow for a final agency decision in August, 2003. Appeals must be submitted in writing to the Contracting Officer (Mr. Dan Signore) at the US Army Medical Research Acquisition Agency (Building 820) here at Fort Detrick.

Q: What is the Public Review Period?

A: The public review period provides all eligible appellants / interested parties an opportunity to review the management study as well as the cost comparison documents between the government in-house bid and the contractor's bid. The purpose of the review is to ensure that there were no errors in computing the in-house cost, or in completing the comparison form DA 7376-R. In order to overturn an initial decision, the appellant must prove that the error was significant enough to change the cost margin or difference to reverse the decision to either in-house or contract performance. Appeals based on factors other than cost or compliance with OMB Circular A-76 procedures, such as the selection of one contractor over another, the decision to conduct the study, or management decisions within the management study, will not be considered by the AAB.

As stated above, the public documents viewing and appeal filing period will begin January 8, 2003 and the review of the documents will be available by appointment.

Q: Who are eligible appellants/ interested parties during a cost comparison?

A: Eligible appellants/ interested parties include only those individuals or employee organizations representing affected federal employees, contractors and other organizations that could be affected by the tentative cost comparison decision to convert to or from in-house, contract, or Interservice Support Agreement (ISSA) performance as a result of the cost comparison. Such individuals include the following:

- The affected in-house employees (i.e., appropriated fund civilian employees being cost-compared whose work is being competed) or their representative(s);
- Contractors who submitted formal offers;
- An agency that has submitted a formal offer via an Interservice Support Agreement.

Q: Do you expect any appeals and should employees appeal if the MEO wins?

A: Yes, there are almost always appeals on these studies. Also, even if the In-house / Most Efficient Organization wins the competition, employees or their representatives should still look for errors in the cost study documentation. The reason for this is that contractors will try to find errors to reduce the cost margin and overturn the initial MEO decision. Employees will not know the scope or success of any contractor appeals until after the MEDCOM Appeal Board makes a final decision. Therefore, employees should try to find errors to lower the MEO cost (increase the cost margin) as a means to offset any successful contractor appeals.

Q: Where can I find additional information on the appeal process?

A: Additional information can be obtained in Chapter 7 of DA PAM 5-20 at the following Web site:

http://books.army.mil/cgi-bin/bookmgr/BOOKS/P5_20/CCONTENTS

An excerpt of Chapter 7 is listed below:

7-5. Public review

a. The public review period provides all interested parties an opportunity to review the documentation supporting the in-house cost estimate and the completed cost comparison form. The purpose of the review is to ensure that there were no errors in computing the in-house cost, or in completing the DA Form 7376-R. You will need to make available the following documentation for the public review period:

(1) The completed DA Form 7376-R.

(2) Back-up documents for the in-house cost estimate, such as the DA Form 7376-R audit trail and materials lists.

(3) The complete management study report.

b. You will need to plan for the public review period prior to the cost comparison bid opening date. You should arrange for a facility for the review period with necessary furnishings for the reviewers. Be prepared to move the appropriate documentation to that location immediately following the cost comparison bid opening..

c. Interested parties include the employees of the activity under study, unions and other employee organizations representing affected federal employees, and contractors who responded to the solicitation. Any of these persons may review the study documentation and submit an appeal if they feel it is warranted.

d. For sealed bid procurement, the Contracting Officer will announce the dates for the public review period at the cost comparison bid opening. These dates will correspond with those specified in the solicitation. The public review period will begin on the date of bid opening and will last for a

period of 20 calendar days. MACOM may extend the period to a maximum of 30 days if the cost comparison is particularly complex.

e. For negotiated procurement, the public review period will begin on the day following MACOM notification of the initial decision. It lasts for 20 calendar days from that date. MACOM may extend the period to a maximum of 30 days if the cost comparison is particularly complex.

f. If any interested party finds what is believed to be an error, he/ she may file an administrative appeal following published procedures. If no errors are identified, you can complete the Final Decision Report and proceed with the cost study process.

7-6. Administrative appeals

a. An appeal of a cost competition must address specific line items on the DA Form 7376-R and explain the deviation from established costing procedures. It must also identify documentation to support the claim. Appeals based on factors other than cost or compliance with OMB Circular A-76 procedures, such as the selection of one contractor over another, the decision to conduct the study, or management decisions within the management study, will not be considered.

b. Administrative appeals must be submitted in writing to the Contracting Officer. They must be received by the close of the public review period in order to be considered. If an appeal is filed late, or otherwise does not comply with the established procedures there will be no further opportunity to appeal. It is important that you make this clear to the employees in the function. Any appeal they wish to submit must address costing issues or noncompliance with OMB Circular A-76 procedures. It also must be submitted in writing and on time. The Contracting Officer will forward the appeal to the MACOM within five calendar days of receipt.

c. The MACOM appoints the Administrative Appeals Board (AAB) on formal orders. The AAB's duty is to address all appeals that comply with the submission procedures. The AAB may be appointed to render a decision on one specific cost competition decision or it may be a standing board to consider appeals of all cost competition decisions over a given period of time.

(1) The AAB is made up of at least three individuals. These individuals should be senior military or civilian personnel who have some knowledge or experience in CA program requirements and costing procedures, contracting, or management. A legal advisor experienced in the procurement process should be available to the board, as needed. The AAB members must be impartial and avoid any and all appearance of conflict of interest. The Staff Judge Advocate will review AAB candidates for potential conflict of interest prior to official appointment.

(2) The following lists categories of personnel who are not eligible to serve as members of the AAB:

(a) Anyone who took part in the cost study under appeal.

(b) Anyone directly associated with the function in the cost study under appeal.

(c) Anyone working in the activity or anyone having spouses, children, parents, siblings, or household members working in the activity in the cost study under appeal.

(d) Anyone working for the command or organization having direct jurisdiction or control over the activity in the cost study under appeal.

(3) The AAB chairperson must meet the following criteria:

(a) Be from an organization that neither supports nor receives support from the activity in the cost study under appeal.

(b) Be from another installation or command or from the MACOM.

(c) Be of the same or higher rank or grade as the official who approved the initial decision.

(4) The AAB is activated as soon as the first appeal is received. This means that the members must be selected and appointed prior to the initial decision. The AAB reviews all issues raised in each appeal. They also review all of the documentation supporting the in-house cost estimate and the initial decision. The AAB may also ask personnel involved in the study to provide additional information or explanation of cost study materials.

(5) The AAB prepares a written decision on each valid appeal. The decision must address each allegation in the appeal, including what consideration was given the claim and explanation if the allegation is disallowed. With the exception of invalid appeals, the AAB must render its decision within 30 calendar days of receipt of the individual appeal.

(a) If the AAB determines that an appeal is not in compliance with submission criteria, it will return the appeal to the appellant immediately with an explanation of why the appeal is non-compliant.

(b) Appeals may be upheld in their entirety, meaning that the AAB finds in the appellants' favor on all allegations within the appeal. Appeals may also be denied if the allegations are not substantiated by the documentation supporting the cost estimates. In many cases, however, the AAB will uphold some of the allegations and deny others within the same appeal. The total effect of the AAB findings on the initial decision is determined by the AAB.

(6) If the AAB determines that errors were made in the cost estimates, the AAB chairperson will direct the cost estimating official to correct the errors on the DA Form 7376-R. The installation Internal Review Office will then verify the revised calculations.

(a) If the decision of the AAB does not reverse the initial decision, a copy of the written decision on each appeal is provided to the appellant and qualified interested parties. A copy is also provided to the installation Contracting Officer and CA program manager and to the MACOM CA program manager. The installation CA office will forward a copy of the findings to the MACOM with the final decision report. At this point, the installation will continue with the remainder of the CA process.

(b) If the decision changes the results of the final decision, the AAB chairperson will notify the CA manager so he/she can notify the MACOM of the new decision and then to the local community. A copy of the written decision on each appeal is provided to the appellant and to affected parties. Copies are also given to installation managers as noted in paragraph (a) above.

(c) The decision of the AAB is final. No further appeals will be considered, even if the AAB findings reverse the initial decision. AAB decisions are not subject to negotiation, arbitration, or agreement.

7-7. General Accounting Office (GAO) protests

a. Contractors participating in any government procurement may protest to the GAO.

b. Private contractors are the only parties who may file protests to the GAO regarding the results of a CA cost competition. Contractors may also use the administrative appeals process as discussed above, but this is not required. The protest must be filed with the GAO within 10 working days after the AAB has rendered their decision.

c. If a protest is filed, the GAO will notify the installation contracting office that a contractor has filed a protest. At this point, you must stop the CA process until the GAO renders their decision. The contracting officer and the CA office will need to furnish the GAO with whatever supporting documentation they require to reach their decision. Once they have received the supporting documentation, the GAO has 100 working days (or 65 calendar days under the express option) to render a decision on the protest, unless GAO establishes a longer period of time. The GAO will provide a written decision on all points of the protest, including instructions to the installation regarding corrective action, as required.

d. The installation Contracting Officer and CA office will take the necessary action to implement the GAO recommendations or directions. Once this is accomplished, the CA study process should continue to completion.